No. 20822

IN THE

United States Court of Appeals For the Ninth Circuit

INSURANCE COMPANY OF NORTH AMERICA, a corporation

Appellant,

vs.

THOMAS J. THOMPSON,

Appellee.

BRIEF OF APPELLEE

Appeal from the United States District Court for the District of Idaho

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ROBERTS & POOLE
111 Broadway
Boise, Idaho
Attorney for Appellee

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BRIEF OF APPELLEE

I. JURISDICTION

As is stated by Appellant, jurisdiction in the District Court was based on the provisions of 28 USCA Section 1332. The District Court found jurisdiction in its Pre-Trial Conference Order (R. 47).

This appeal is before the Court of Appeals on the Notice of Appeal and undertaking filed herein by Appellee (R. 222-223). Jurisdiction is conferred under 28 USCA Section 1291.

II. STATEMENT OF FACTS

This action was instituted by Appellee, Thomas J. Thompson, by occupation a working superintendent of heavy construction projects, for recovery of $50,000.00 claimed to be due from Appellant to Appellee pursuant to the terms of a total permanent disability policy issued by Appellant insuring Appellee for the period of September 1, 1963, to September 1, 1964. Appellee, as an eligible employee of Constructora Emkay, S.A., a subsidiary of Morrison-Knudsen Company, Inc., applied for the policy (R. 37-45, Exhibit 4) and was insured thereunder effective September 1, 1963. Appellee was at this time employed and working as a working superintendent on heavy construction tunnel work in Bogota, Colombia. The applicable portions of the insurance policy, so far as material to this action, are as follows:

> "TO INSURE such eligible persons who elect to become insured under this policy, herein called the Insured, against specified loss described in Part I—Description of Coverage resulting directly and independently of all other causes from bodily injuries caused by accident occurring while this policy is in force, herein called such injuries."
>
> . . . .
>
> "COVERAGE B — PERMANENT TOTAL DISABILITY: After one year of 'continuous total disability,' and if the Insured is

then 'permanently and totally disabled' the Company will pay a Permanent Total Disability Benefit equal to the difference between the Principal Sum and any payments made under Coverage A on account of such injuries.

" 'Continuous total disability,' which must result from such injuries and commence within 30 days after the date of accident, means the Insured's complete inability during the first year thereof to perform every duty of his occupation.

" 'Permanently and totally disabled," means the Insured's complete inability, after one year of continuous total disability as defined above, to engage in an occupation or employment for which the Insured is fitted by reason of education, training or experience for the remainder of his life."

. . . .

"This policy does not cover loss caused by or resulting from any one or more of the following:

. . . .

"D. Illness, disease, pregnancy, childbirth, miscarriage, bodily infirmity or any bacterial infection other than bacterial infection occurring in consequence of an accidental cut or wound,

. . . ."

Appellee, on September 9, 1963, was injured while working for his employer in a tunnel accident, the accident having occurred when he slipped on an oily surface, fell backwards and struck his neck on a steel collar (TR 23-24). Prior to going to Bogota, Colombia, Appellee was a healthy, robust, middle-aged man in good physical condition (TR 229, 253). He had followed heavy construction or worked in the mines all of his life (TR 11-19). He was accepted by Morrison-Knudsen Company, Inc., just before leaving for Colombia as being physically fit for heavy construction work. Following the September 9, 1963, accident Appellee was medically treated and hospitalized in Bogota, Colombia (TR 25-28). He returned to Boise, Idaho, on or about October 21, 1963. Following Appellee's return from Bogota, Colombia, his physical appearance and condition had materially and substantially deteriorated. He was very white, humped over, and could hardly walk (TR 230, 253, 254). After his return to Boise, Idaho, he consulted Jerome K. Burton, an orthopedic specialist, for extreme pain and discomfort in his neck, shoulder, arms and head, and during the course of the next several months was extensively examined by numerous physicians, surgeons and specialists, one of whom, Edward J. Kiefer, a neurosurgeon, recommended that he undergo a myelogram for diagnostic purposes. Administration of the myelogram is a usual and customary diagnotic procedure for back injuries where nerve involvement is suspected (TR 126). Appellee was given the myelogram at St. Alphonsus hospital on February 21,

1964, and as a result thereof, Dr. Kiefer diagnosed his difficulties as possibly a cervical disc protrusion possibly involving a nerve root or the spinal column (TR 294-295).

Shortly after Appellee was returned to his hospital room following the myelogram (about two hours) (TR 32), he got out of bed to go to the bathroom and felt immediate severe pain in both legs, which pain has persisted ever since (TR 57, 112), and was and is sufficiently severe as to be completely disabling within the meaning of the language of the insurance policy (TR 36-39, 68-74, 124-126). Following the myelogram on February 28, 1964, Appellee underwent an operation (cervical laminectomy) for surgical correction or improvement of the cervical disc protrusion (TR 296-302). This operation relieved to some degree Appellee's symptoms, but did not entirely correct them (TR 33).

Appellee, at various times prior to the accident of September 9, 1963, suffered other industrial accidents with various degrees of severity, but nevertheless, Appellee was fully capable of performing the duties of his occupation and employment at the time the subject policy was issued to him and at the time of the accident on September 9, 1963 (TR 22, 23, 34). Appellee throughout all his adult life had engaged, and at the time of the accident on September 9, 1963, was engaging in hard physical labor (TR 11-19), and by reason of education, i.e. eighth grade, and experience, was not qualified for any employment that did not involve a great deal of

physical effort. The injuries Appellee suffered prior to the injury of September 9, 1963, did not prevent Appellee from performing his usual occupation (TR 215-216).

Appellee was continuously totally disabled for the first full year after the September, 1963, accident and on or after that date Appellee mailed notice to Appellant that he claimed the benefits of the policy (Exhibit 19, R. 78). Appellee has, ever since the September 9, 1963, accident, been completely disabled from doing any work involving any material physical exertion whatever and is not educationally qualified or qualified by reason of experience to engage in any occupation other than active participation in heavy construction and mining employment. He is unable to be on his feet except for short periods of time. He is unable to sit for prolonged periods of time. He must lie down frequently (TR 260, 272, 274). He is nervous and shaky and unable to drive an automobile except for short distances (TR 32-33, 37, 69, 271-272). His physical condition is permanent and cannot be improved (TR 215). His total permanent disability is the result of the September 9, 1963, accident and medical treatment received for it (TR 278-279, 282).

At the trial of this cause the jury found for Appellee and the Court entered judgment for Appellee in the amount of $50,000.00, being the face amount of the policy of insurance. Following a special hearing the court awarded an additional $10,000.00 for attorneys fees pursuant to Idaho

Code, Section 41-1839, and the prayer of the Complaint.

III. ARGUMENT

1. *Summary*

Appellee's argument will consist of a brief introduction, an answer to each of Appellant's Specification of Errors, and an answer to the questions raised as reflected on Pages 32 and 33 of their Brief.

There are two primary issues in this case: (1) Whether Appellee is totally and permanently disabled within the meaning and language of Appellant's policy; and (2) whether Appellee's permanent total disability resulted directly and independently of all other causes from the September 9, 1963, accident and was not due to loss caused by or resulting from any one or more of the following: Illness, disease, or bodily infirmity.

Appellee maintains that the above issues involved disputed questions of fact upon which there was presented at trial substantial and competent evidence to support the propositions on behalf of Appellee that he was totally and permanently disabled within the language of the policy and that his disabilities resulted directly and independently of all other causes from injuries received in the September 9, 1963, accident.

There was a great deal of evidence presented by both sides in support of their respective positions and there is a great deal of substantial evidence to

support the jury's determination of the factual issues in favor of Appellee.

The responsibility of determining disputed questions of fact rests with the jury. Where there is substantial evidence, though conflicting, to support the verdict it will not be disturbed on appeal. 5A C.J.S., Appeal & Error, Sec. 1648; *Kent v. Campbell*, 80 Idaho 28, 324 P.2d 388.

We will now proceed to examine Appellant's Specification of Errors and in doing so, will first consider the numbered Specifications 1 through 28, following which we will consider, in the order presented on pages 32 and 33 of Appellant's Brief, the remainder of "Questions Presented."

2. *Specific Issues*

(a) Specification of Errors Nos. 1, 2, 3, 11, 12, 16, 22 and 28 are essentially the same and we will treat them together.

The substance of Appellant's claimed errors are that the court should have granted Appellant an involuntary dismissal, directed verdict, judgment notwithstanding the verdict, and a new trial because Appellant claimed that Appellee had injuries in his lifetime that contributed in whole or in part to his present total permanent disability.

The contention of Appellant was a disputed question of fact at trial. There was ample evidence to support Appellee's claim that the sole cause of his total permanent disability was the September 9,

1963, accident and the results of medical treatment necessary for diagnostic purposes. The injurious results of the medical diagnostic procedures related back to the September 9, 1963, accident. In order to have ruled that Appellee's permanent total disability was the result of other injuries, the court would have necessarily had to ignore the testimony of several witnesses that Appellee at the time of the accident was physically able to and was, in fact, fully performing the work required of him in his occupation. It would also have been necessary for the court to have added language to the exclusionary portions of the policy not therein contained.

(b) Specification of Errors Nos. 4 and 5:

Specification of Error No. 4 reads as follows:

> "The Court erred in giving Instruction No. 11, Para. 2, TR 423, reading,
> 'You are further instructed that legal notice and proof of loss were timely made,' "

The policy contains a provision as follows:

> "Notice of Claim: Written notice of claim must be given to the Company within twenty days after the occurrence or commencement of any loss covered by the Policy, or as soon thereafter as is reasonably possible. Notice given by or on behalf of the claimant to the Company at Philadelphia, Pennsylvania, or to any authorized agent of the Company, with information sufficient to identify the In-

sured, shall be deemed notice to the Company."

No liability under Appellant's policy could have accrued until there had been 365 days of continuous total disability to perform every duty of his occupation. Therefore, any notice to the company prior to September 9, 1964, would be premature. Appellee's completed proof of loss form dated 9-9-64 and thereafter mailed to Appellant fully complied with the above provisions of the policy as well as the following provision:

> "Proofs of Loss: Written proof of loss must be furnished to the Company within ninety days after the date of such loss. Failure to furnish such proof within the time required shall not invalidate nor reduce any claim if it was not reasonably possible to give proof within such time, provided such proof is furnished as soon as reasonably possible and in no event, except in the absence of legal capacity of the Insured, later than one year from the time proof is otherwise required."

Further, Appellee did not file suit until January, 1965, which complied with the provisions of the policy entitled "Legal Actions," to-wit:

> "Legal Actions: No action at law or in equity shall be brought to recover on the Policy prior to the expiration of sixty days after written proof of loss has been furnished in accord-

ance with the requirements of the Policy. No such action shall be brought after the expiration of three years after the time written proof of loss is required to be furnished."

Furthermore, Appellant has shown no prejudice resulting from lack of notice. 29A Am. Jur., Ins., Sec. 1382, *Hope Spoke Co. v. Md. Casualty Co.*, 143 S.W. 85.

(c) Specification of Errors Nos. 6 and 8:

Appellant assigns error and much of its argument to the trial court's failure to give its Requested Instruction No. 4 (R. 157) (Specification of Error No. 8) and the court's giving in lieu thereof Instruction No. 13 (Specification of Error No. 6) and Instruction No. 16 (Specification of Error No. 11). The Requested Instruction reads in part as follows:

"I instruct you that the accident insurance policy which plaintiff is covered by does not cover losses or disabilities which are brought about either *directly or indirectly, in whole or in part*, caused by resulting from any illness, disease, bodily infirmity . . ." (emphasis added)

The exclusionary provisions in the policy in question are not so defined. They read as follows:

"This policy does not cover loss caused by or resulting from any one or more of the following:

. . . .

D. Illness, disease . . . bodily infirmity . . ."

The words "wholly or in part, directly or indirectly" do not appear in the contract. It is true that they are frequently used in policies of this type. In fact, all of the cases cited in Appellant's Brief deal with words of limitation of this sort. They are not included in Appellant's Policy OKU 6303, however.

There is certainly a definite distinction between a policy which excludes death or loss wholly or partly, directly or indirectly, resulting from disease or bodily infirmity and one where only such bodily infirmity or disease as cause or result in death or loss are excluded.

This reasoning is consonant with the generally accepted rule of construction in insurance contracts favoring coverage and protection to the insured as opposed to denying coverage. In the type of exclusion chosen by and presented in Appellant's contract it excludes such death or loss as are caused or result from bodily infirmity or disease. Whereas, in the other type of policy the companies have meant to exclude any death or loss which in any way, even partially or indirectly, is caused by infirmity or disease.

If the trial court had granted Appellant's Requested Instruction No. 4, it would have added words of exclusion to the contract which did not exist. The court was perfectly correct in denying the same. To do otherwise would have been seriously prejudicial to Appellee and a misstatement of the

issues. The same may be said of Appellant's Requested Instruction No. 6 (R. 159), which is a further and like misstatement of the policy terms and the applicable law. What the court did instruct on the question of causation was as follows:

> Instruction 13 (TR 436)
> "In order to recover, the plaintiff must prove, by a preponderance of the evidence as in these instructions defined, each of the following:
> . . . .
> 4. That such disability resulted directly and independently of all other causes from bodily injuries caused by accident."

The court continues in Instruction 16 (TR 437) to state:

> "Evidence has been received of injuries suffered by the plaintiff prior to the accident of September 9, 1963. You may consider this evidence in determining whether or not the disability claimed by the plaintiff resulted directly and independently of all other causes."

Under these two instructions, if the jury were to find in favor of Appellee it had to conclude that the accident in question was the direct and independent cause of the disablity. Conversely, it necessarily had to find that the ensuing disability was not caused by or the result of either disease, bodily infirmity or previous injuries.

Taking the whole of the court's instructions, Appellee believes the issues were fairly presented to the jury. The court is not bound nor would logic direct that under its instructions it present the policy to the jury in haec verba. To dispell confusion and misunderstanding, it is permissible for the trial court to fairly reduce the contract in its view of the law and issues to terms more simple and understandable to the jury.

The Appellant has not shown error under Specifications 4, 5, 6, 11 and 12.

It is significant to note that Appellant has cited no case in which an instruction such as its Requested Instruction No. 4 has been given or its refusal found prejudicial.

All of the cases which are cited by Appellant in support of its contention in this point involve policy exclusions having broader definition and scope. Further, in each case there is present either an active pre-existing disease or bodily infirmity without which the loss or death would not have resulted.

The case of *Lado v. First National Life Insurance Co.*, 162 So. 579 (cited at page 60 Appellant's Brief), has no relevancy to the issues here. That case was resolved on a finding that insured died of a syphilitic condition of the aorta and valves of the heart. Death due to venereal disease was expressly excluded in the policy.

Moore v. Southern Life and Health Co., 195 S. 857 (cited at page 60 Appellant's Brief) is equally inapplicable.

The fact that Appellee may have suffered previous injuries resulting in abnormal physical differences would not prevent his recovery unless they directly caused the disability. See *La Barge v. United Insurance Co.*, 306 P.2d 380, where the Oregon Court stated:

> "Certainly, physical differences, as . . . render some more susceptible to the sustaining of crippling disabilities after trauma than others, but unless the differences are great enough in and of themselves to threaten imminent disability of the kind actually resulting, they cannot later be said to have been the cause of the disability." citing *John Hancock Mutual Life Insurance Co. of Boston, Mass., v. Crock*, 216 F.2d 805 (CCA 4th)

Moreover, it is noted that in the case of *Russell v. Glen Falls Indemnity Co.*, 134 Neb. 631, 279 N.W. 287, cited by Appellant, the following Instruction No. 5 given by the trial court was cited in the appellate court's opinion without any criticism whatever:

> "The burden is upon the plaintiff to establish by a preponderance of the evidence the following propositions:
>
> . . . .
>
> (3) That injury and deafness was caused solely from such claimed accidental means directly, independently and exclusive of all other causes."

What the appellate court did find objectionable, however, was a subsequent instruction which gave the jury liberty to find in favor of plaintiff in spite of the fact that it might find that death resulted from direct aggravation of a pre-existing disease (deafness). This was clearly a misinterpretation of the policy provision, but had the trial court in the *Russell* case deleted this instruction and added one similar to Instruction No. 13, i.e. that the jury could consider plaintiff Russell's pre-existing deafness and infirmity in determining whether his disability resulted directly and independently of all other causes, there would seemingly have been no reversible error.

Brief comment will be made in the Appellant's case of *Davis v. Jefferson Standard Life Insurance Co.*, 73 F.2d 330 (cited pages 53 and 60 Appellant's Brief). A portion of the opinion is set out at page 53 of Appellant's Brief. When read in its true context we see that the statement quoted by Appellant is dictum and not necessary to the result as the court found that the insured died as a direct result of a weakened heart.

It is true that courts cannot extend coverage beyond the terms of the policy. For the Appellant to imply from the quoted portion of the *Davis* case that construction and interpretation of the policy are to be limited in favor of the insurer is, however, contrary to law.

Support for liberal rather than conservative construction can be readily found. In *Rauert v. Loyal*

Protective Insurance Co., 61 Idaho 677, 106 P.2d 1015, we find the following:

> ". . . For this reason the rule of *strictissimi juris* has been applied almost universally to insurance contracts, and this jurisdiction, like many others, has declared in favor of a liberal construction in favor of the insured to accomplish the purpose for which the insurance was taken out and for which the premium was paid."

The following excerpt from this court's opinion in *New York Life Insurance Co. v. Wilson*, 178 F.2d 534, is pertinent to this question:

> "The policy exclusions to be considered under the second question are, specifically, those where death results directly or indirectly from infirmity of mind or body, from illness or disease. We understand it to be the general view that provisions of this sort are strongly construed against the insurer, and that indemnity for death from accident covers death resulting from bodily infirmity or disease directly attributable to and proximately caused by the accident."

We wish to emphasize that in the *Wilson* case the policy exclusions were those not only directly caused or resulting from disease or infirmity, but those "indirectly" as well. A fortiori, when as in the Appellant's policy the words indirectly, partially, etc., do not appear.

The term "infirmity" has been construed as being practically synonomous with disease so far as they relate to some body impairment or disorder. To amount to an infirmity within the meaning of the exclusions of an accident insurance policy the condition must be of a substantial character sufficient to impair in some material degree the insured's health and well-being. 75 ALR 2d 1243.

In *New York Life Insurance Co. v. McGehee* (1958 CA5 Ala), 200 F.2d 768, we find the following statement:

> "A review of the Alabama cases and the decisions of this Court shows that considerable latitude must be allowed the jury in determining the question of causation. An insurer cannot escape liability simply by showing that some disease may have contributed to some extent to the insured's death . . . If an insured has an active disease of such a character as to endanger the insured's life, apart from the accident, such a disease is a contributory cause that will bar recovery. If, however, an injury starts a chain reaction resulting in death, recovery may be allowed even if one of the links are dormant diseases or physical conditions without which the chain would be broken."

See also *Reserve Life Insurance Co. v. Poole* (1959) 107 SE 2d 887, where the court affirmed a judgment for plaintiff notwithstanding evidence that plaintiff's disability was due to a cooperation

of the accident and a pre-existing arthritic condition, the court stating:

> ". . . if the plaintiff's physical condition was such that while he was in some respects in less robust health than another man of his age might have been, so that he was more susceptible to disability on account of the injury he received as a result of the accident, although another not suffering from a similar weakness would not ordinarily have suffered a disability as a result of such an accident, he may nevertheless recover."

In *La Barge v. United Insurance Co.* (1958) 209 Oregon 282, 303 P.2d 498 (on rehearing 306 P.2d 380), the insurer unsuccessfully sought to avoid liability under double indemnity insurance on grounds that the insured's arthritic condition cooperated with the accident causing death. The court held that abnormalities and infirmities of the insured are to be considered dormant and not to exclude coverage where the insured is able to go on about his daily activities and earning his livelihood.

For an exhaustive treatment of the subject see 84 ALR 2d, annotation beginning page 176.

Appellee believes these foregoing authorities reflect the more logical, reasonable and most current construction followed by the courts in matters involving insurance contract provisions of the nature now present. The law to be applied here is that expressed by this court in *New York Life Insurance*

Co. v. Wilson (supra). Accordingly, Appellant's Requested Instruction No. 4 (TR 157) was an inaccurate statement of the applicable law and was properly rejected by the trial judge.

The court's charge to the jury that Appellee must establish by a preponderance of the evidence that his disability, if found to exist, resulted directly and independently of all other causes from injuries sustained in the accident and that the jury should consider the Appellant's evidence of previous injuries in determining the question of direct and independent causation, was an accurate presentation of the law of the case.

(d) Specification of Error No. 7:

Appellant objects to the court's Instruction No. 13 because the instruction would allow the jury to find Appellee's "total and permanent disability from performing in the usual and customary manner an occupation or employment for which he is fitted by reason of his training, experience or education for the remainder of his life" began within 365 days rather than after 365 days from the accident. Under the facts of this case the error, if any, was harmless since the evidence is clear that Appellee was permanently disabled within both definitions under the policy from the time of the accident on September 9, 1963, and he made no effort to make proof of loss until after the expiration of one full year.

(e) Specification of Errors Nos. 9 and 10:

Appellant complains of the court's failure to give its Requested Instruction No. 5 in which it requests the trial court to define an accident as follows:

> "You are hereby instructed that the term 'accident' as used in the policy is defined as an act which is not natural or probable and should not reasonably, under all of the circumstances, have been foreseen, and is tragically out of proportion to the trivial cause."

The court rejected this definition and gave instead Instruction No. 15, leaving off of the language of Requested Instruction No. 5 the following words: "and is tragically out or proportion to the trivial cause."

Appellant cites as authority *O'Neil v. New York Life Insurance Co.*, 65 Idaho 722, 152 P.2d 707. This case involved interpretation of double indemnity life policy which excluded death *resulting from insured's committing an assault or felony.* Insured died as a result of injuries received in an altercation. The court found that "if the result of an act was not natural and probable and should not reasonably, under all the circumstances, have been foreseen and it is tragically out of proportion to a trivial cause, it is an accident within the meaning of the above quoted provisions of the insurance contracts in question." The phrase "and is tragically out of proportion to a trivial cause" was added to the common and accepted definition of the term accident as used by the court below in its Instruction No. 15 to suit particular facts and contract provisions not present

in the case at bar and moreover, for the express purpose of broadening that meaning in order to cover the unusual death of the insured.

The phrase is not applicable to the facts at bar and, therefore, Instruction No. 15, giving the accepted definition of the term "accident," was sufficient and without any prejudice to Appellant.

A fortiori, the *O'Neil* case held the burden of proof was on the insurer to show that the death of insured was within one of the exceptions contained in the policy. Citing *Mober v. Continental Casualty Co.*, 37 Idaho 667, *New York Life Insurance Co. v. Jennings*, 6 S.E. 2d 431, *Mah See v. North American Acc. Ins. Co.* (Calif) 213 Pac. 42.

(f) Specification of Errors Nos. 13, 14, 15 and 17:

Appellant objects to the court giving the following instruction (Instruction No. 17, TR 437)

> "If you find that the plaintiff suffered an accident on September 9, 1963, resulting in injury to his cervical spine, you are instructed that the plaintiff was under an obligation to submit to reasonable medical treatment in order to alleviate the injury and minimize the possibility of any disabling effects therefrom."

and Instruction No. 18 which reads as follows:

> Instruction 18 (TR 437)
> "If you find that in February, 1964, the plaintiff underwent myelographic studies and a

surgical operation of his cervical spine and that such myelographic studies and surgical operation were, from a medical standpoint, necessary to deal with the effects of the injury suffered by the plaintiff on September 9, 1963, and if you further find that the effects of either said myelographic studies or surgical operation resulted in or contributed to the plaintiff's present disability, you are instructed that the consequences following the myelographic studies and the surgery are to be regarded by you the same as though they had followed the injury of September 9, 1963, without any intervening medical treatment or surgery."

Appellant claims in substance that a bizarre or unusual result of the myelographic studies would constitute a separate accident. Appellant cites no authority in its argument on any of the above Specifications. The court's instruction was a correct statement of the law.

The insured under an accident and disability insurance contract who has suffered an injury within the coverage of the contract must submit to reasonable medical treatment to minimize any resulting disability. 29A Am. Jur., Ins., Sec. 1536, p. 642; 45 C.J.S., Ins., Sec. 939; *Cody v. John Hancock Mutual Life Ins. Co.*, 163 S.E. 4; 86 ALR 354; *Culver v. Prudential Ins. Co. of America*, 179 A. 400; *Mutual Life Ins. of N. Y. v. Knight*, 178 S. 898.

Where a surgical operation becomes necessary to properly treat the effects of an injury within the coverage of an accident insurance contract and the insured dies or becomes totally disabled as a result of the operation or treatment, such death or disability results independently of all other causes from such injury although the death or disability is due to some latent infirmity or a cause wholly unrelated to the injury. *Rauert v. Loyal Protective Ins. Co.*, 61 Idaho 677, 106 P.2d 1015; *Ballam v. Metropolitan Life Ins. Co.*, 3 N.E. 2d 1012; *Collins v. Casualty Co. of America*, 112 N.E. 634; 108 ALR 1, Annot.; *State Farm Mutual Auto Ins. Co. v. Underwood*, 377 S.W. 2d 459; 29 Am. Jur., Ins., Sec. 1219, 1220; *Gardner v. United Surety Co.*, 125 N.W. 264; *Travelers Ins. Co. v. Murray*, 26 Pac. 774.

Appellant denies that the effects of the myelographic study should relate back to the accident of September 9, 1963. It has cited cases in support of its contention which involved extremely unusual circumstances and unrelated events in support of this theory, such as where a portion of the ceiling collapsed in the operating room severely injuring the insured. Appellee submits such cases are not applicable to the facts in the case at bar. There is competent and substantial evidence in the record that the myelographic study was a proper and necessary diagnostic treatment of the condition from which the Appellee was suffering. There is substantial evidence that the results of the myelographic study and its disabling effects are, although unusual, a

hazard and risk which may be expected from the effects of the opaque dye in the spinal column (TR 127; TR 280, 281; TR 381, 382).

Support for Instruction Nos. 17 and 18 are found in the Idaho case of *Rauert v. Loyal Protective Insurance Co.* (supra). There the trial court refused requested instructions of the insurance company similar to Appellant's Requested Instruction Nos. 4 and 17 (Specification of Errors Nos. 8 and 16), and gave instead the following Instruction which was approved by the Supreme Court of the State of Idaho:

> "You are instructed that if you find from the evidence that William Rauert received an accidental injury commonly known as hernia or rupture and that such injury was the active efficient cause which set in motion and introduced other agencies, including septicaemia, which resulted in his death without the intervention of any other independent force, then and in that event the said injury so commonly known as hernia should be regarded as a sole and proximate cause of his death."

The "septicaemia and other agencies" mentioned in the instruction were the effects and the results of the operation performed on the insured following and occasioned by the hernia. This is clearly analogous to the case at hand.

(g) Specification of Errors Nos. 18 and 20:

Appellant complains that he was not allowed to show Appellee's salary while he worked overseas. There was a full description of Appellee's education, abilities, prior work and experience in the record and what he was paid for what he had done in the past was neither relevant nor material. His ability to perform his occupation was the issue—not what he had in the past been paid. The court was entirely correct in rejecting the offered proof.

Specification of Errors No. 18(b) and 20(a) concerned an attempt by Appellant to ask Appellee about statements in the verified Complaint to which the trial court sustained an objection on the ground that such pleadings were superseded by pre-trial orders. Furthermore, there was nothing inconsistent anywhere in Appellee's testimony or that of other witnesses for Appellee with what appeared in the verified Complaint. The statements in the Complaint were not inconsistent with Appellee's testimony.

Specification of Errors Nos. 18(c) and 20(b). Appellant objects because he was not permitted to ask Appellee about pleadings filed before the Industrial Accident Board concerning the combination of Appellee's various prior injuries with the injury of September 9, 1963, contributing to total disability. The court's refusal to admit the testimony was proper for the reason that under Workman's Compensation laws all previous disability awards and disabilities must be taken into consideration in

determining an employer's liability. Further, under Workman's Compensation laws permanent disability means a complete disability to enter into any gainful occupation which is not the test in this case. The court, by its ruling, simply prevented the Appellant from injecting Workman's Compensation issues into a contractual case based on an insurance policy and prevented the trial from being sidetracked into the trial of other issues, to-wit: The various legal differences attendant to pleading a Workman's Compensation case and a case under Appellant's policy. Besides, when viewed in light of Workman's Compensation laws, there was nothing inconsistent with Exhibit 10 and Appellee's testimony or pleadings in this trial.

(h) Specification of Error No. 19:

This specification concerns the admissibility of Appellee's Exhibit No. 20 which was a medical report of Appellee's physical condition just prior to his departure for overseas to take the job he was performing when injured.

The witness, Alfred J. Goade, testified (TR 243-246) to be the manager of administration and accounting for Morrison-Knudsen Company, Appellee's employer, through which the Appellant's policy of insurance was issued. He stated that the medical report was a business record kept and maintained in the normal course of his employer's business; that it was prepared following Appellee's physical examination preparatory to his employment overseas; that he knew of his own knowledge that it was the

records from the files of Morrison-Knudsen Company.

28 USCA 1732 provides:

> "(a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible as evidence of such act, transaction, occurrence or event, if made in regular course of any business, and if it was the regular course of such business, to make such memorandum or record, at the time of such act, transaction, occurrence or event or within a reasonable time thereafter.
> . . . ."

That a medical report furnished an employer by the examining physician made in regular course of business is admissible where otherwise relevant cannot be denied. 32 C.J.S., Evidence, Sec. 730(2); *Landon v. U.S.*, 197 F. 2d 128.

The evidence was uncontradicted that (1) the report was made in the normal course of business, and (2) that it was normal to keep such record in connection with the employer's business.

Neither the Federal rule nor the Idaho rule on business records require the custodian of the records to make identification; any qualified witness may do so.

Appellee does not maintain that the medical report was a physician's business record as Appellant's argument would imply. Consequently, much of that argument is irrelevant. Moreover, there was ample evidence from other sources, witnesses, etc., uncontradicted which showed Appellee was in good robust health at the time of the examination reflected by Exhibit 20. Also, evidence of his good condition is corroborated by fact that Appellee did, in fact, well perform the tasks of his employment.

Exhibit 20 was cumulative of the fact it represented and certainly no prejudice could have arisen from its admission.

(i) Specification of Error No. 21:

Appellant alleges misconduct on the part of the trial court consisting in showing of favoritism to Appellee and cites the instances following:

TR 246, wherein the court, in response to Appellant's objection that an offered exhibit was heresay, queried Appellant's counsel as to whether he wished a recess so that another company officer having actual physical custody of the document could be called for purposes of identification of the exhibit. The heresay objection by Appellant's counsel was a highly technical one and not the proper objection to the question asked. It is obvious from reading the transcript at this point that the court had concluded that Appellant's other objections to the exhibit would not be allowed. The issue the trial judge was trying to resolve was whether Appellant's coun-

sel was going to insist upon delaying the trial to cure a technical defect. The court recognized that there was a proper objection that could have been interposed, to-wit: no proper foundation or identification. The defect, if any, obviously could be cured but would result in taking considerable of the court and jury's time. Certainly interjections by the court from the standpoint of expediting the trial and preventing unreasonable and unnecessary delays is a proper function of the trial court. A portion of the court's remarks at this point were made necessary by reason of Appellant's counsel not replying for some time to the court's question, reflected in the following portion of the transcript, TR 244-245:

> "MR. EBERLE: We object to the exhibit, Your Honor, as heresay.
>
> "THE COURT: Very well, do you want to take a recess while we call the proper officer?"

Appellant's counsel did not answer this question except finally after repeated queries by the court. Appellant's counsel in the first instance did not raise the proper objection and the court, in pointing out in effect to Appellant's counsel that identification of the exhibit (i.e. foundation for its admission) was the proper objection, was, if anything, assisting him. Appellant states in its Brief on page 94 "that the Court required Appellant's counsel to state the objection for the third time, that no proper foundation or identification had been made." This is

not the case because Appellant's counsel never did make the proper objection and the matter would probably never have been raised had the court not assisted Appellant's counsel in pointing out the correct objection. Appellee does not complain of the fact that Appellant's counsel may have been helped by the court's remarks for the reason that it is obvious that the court was simply trying to prevent unjustified delay of the trial on purely technical grounds. This we believe to be a proper function of trial judges.

Appellant next objects to the court asking Appellee if he wanted a glass of water (TR 30). What does not appear of record, of course, is the physical condition of Appellee as he was testifying. Certainly, if the trial court, based on his own observation, felt that a party or witness in the courtroom was in physical need of aid he may offer that aid without committing prejudice to either side. Had Appellant at the time felt that the court was not justified in offering water to Appellee, he should have said so; otherwise, how would the physical circumstances or need of Appellee, or lack thereof, ever become a part of the record.

Appellant claims the court's remarks on pages 50 and 51 of the transcript to be prejudicial to him. There was nothing said by the court that could possibly be construed as prejudicial to the Appellant. Appellant was permitted to ask the witness what he wanted to ask him and the court merely attempted to clarify Appellant's counsel's question.

The court also remarked that everyone would have to speak up and speak clearly and asked that both sides ask easier questions so that Appellee, by reason of limited vocabulary, could understand them. It is obvious from Appellee's testimony that his education was limited, i.e. an eighth grade education (TR 11), and his hearing, to some extent, defective, and the request by the court was in all respects a fair one. The court had an opportunity to observe the witness and his difficulty in hearing and understanding, and in view of these factors, any criticism of the court is not justified.

Appellant complains of the court suggesting to Appellee's counsel grounds for objection to an exhibit offered by Appellant (TR 84). Appellee's counsel, rather than stating the proper grounds for objection, had begun stating reasons and argument for his objections. The court cut Appellee's counsel short and properly so, and stated the grounds he would accept. The exhibit being offered was so obviously inadmissible that no prejudice could have resulted to Appellant from its rejection. Counsel for Appellant was attempting to get before the jury records of other litigation where the basis for liability (Workman's Compensation) and the meaning of permanent disability is entirely different than the basis for liability and permanent disability definition in this case. The court is not required to sit idly by and permit either side to present evidence to the jury that is not legally admissible, the effect of which would be misleading and highly prejudicial.

Appellant next complains as to the court's suggesting a way to Appellee's counsel to rephrase a question (TR 117-118) without ruling on the objection. Under the circumstances, this was proper since following the objection Appellee's counsel immediately withdrew the question objected to by stating, "I will rephrase the question." Appellant's counsel had, in stating his objection, pointed the way to rephrase the question and the court simply elaborated on it. We are unable to detect any prejudice in the court's remark or see how it could be construed as prejudicial.

Appellant next complains of the court's suggestion that Appellee's counsel use the word "irritation" rather than "allergy" in a question to which there had been an objection (TR 405). The suggestion was not taken by Appellee's counsel and no harm resulted to Appellant. Further, the court again was merely trying to expedite the trial rather than let it be unnecessarily delayed. Again, no prejudice resulted.

Appellant next states that the court prevented Appellee from testifying to offered Exhibits 8, 9 and 11 (TR 81). This is a misstatement of what took place. In fact, the court actively assisted Appellant's counsel in getting his evidence in the record. Appellant's counsel stated on page 80 of the transcript that he was offering the exhibits to show the percent of disability in each case. Thereafter the court solicited and obtained from both counsel a stipulation as to the percent of disability Appellant

wanted to show and allowed into evidence three of Appellant's exhibits over Appellee's objections. Appellant was helped and not harmed by the court's participation.

Appellant also claims the court should not have made the remarks appearing on pages 192 and 193, lines 1-4, of the transcript. The court, on its own, corrected facts stated by Appellant's counsel in a previous question. The statements made by Appellant's counsel, (TR 192, lines 8-14) were not accurate statements of testimony previously in the record. Appellee's counsel should have objected and didn't. However, Appellant's real complaint is that the court, on its own, would not allow him to misstate the testimony. This is hardly a legitimate basis for claiming prejudicial conduct on the part of the court.

Appellant further asserts that there was no single instance where the same thing (apparently meaning any of the above) was done for Appellant by the court. This is not correct, for example, TR 100, lines 4-9, wherein the court advised Appellant's counsel how he might ask a question, and the assistance rendered Appellant's counsel in connection with the stipulation as to percentage of disability reflected by Exhibits 8, 9 and 11.

The trial of this case lasted 3½ days, 3 days of which were devoted primarily to taking the testimony of witnesses. Appellant has examined the record with a fine-tooth comb and has cited a few isolated instances wherein it alleges the court was

not entirely impartial, although it made no objections to this alleged impartiality at the trial. In support of this allegation of impartiality the Appellant has cited cases (*Mason v. United States*, 63 F.2d 791, *Goldstone v. Rustemeyer*, 21 Idaho 703, 123 Pac. 635, *La Chase v. Sanders*, 142 Conn. 122, 111 A.2d 690, *Coulson v. Wenzel Hotels, Inc.*, 248 Ill. App. 540, and *Hays v. Viscombe*, 122 Cal. App. 2d 135, 264 P.2d 173) wherein the trial judge, under the various factual situations, became an advocate in the case, criticized counsel and the case, made prejudicial remarks, made constant interruptions of counsel, inferred that a party was making a false claim, virtually directed a verdict for one of the parties through comments, and numerous other instances of actual misconduct, none of which are present in this case.

In the case before the Court a great amount of testimony was taken with few objections being made and with relatively little, if any, comment from court or counsel. The trial judge made every reasonable effort to eliminate prejudicial or improper evidence from being brought to the attention of the jury and made every reasonable effort to assist counsel on both sides when an objection was raised by stating, in effect, what portion of the matter involved in a particular question he would not permit and suggesting to counsel what he might or would permit if the question were asked. Not once did he criticize either counsel, witness or party, nor was he discourteous to anyone. He would not permit un-

necessary or unreasonable delay of the trial, nor allow inadmissible prejudicial evidence to be presented to the jury. Both sides were given full and fair opportunity to present their cases and the entire record reflects that both parties received a fair and impartial trial.

It is a well settled rule that in the absence of a proper and timely objection thereto in the lower court, alleged improper conduct or remarks on the part of the trial judge will not be reviewed.

4 C.J.S., Appeal & Error, Sec. 288

Appellant seems to admit that in no specific instance did the court below make remarks or exhibit conduct prejudicial. Appellant seems to rely on an accumulation of matters which evidenced bias on the trial judge's behalf. No objection to such alleged remarks or conduct was made by appellant at the time of trial. A case in point is *Metzenbaum v. Metzenbaum* (Calif), 214 P.2d 603. There the Appellant likewise contended that remarks and conduct on the part of the trial judge indicated his bias and prejudice against them. No objections were made at the time of trial. The court refused to review the same stating in part:

> "If the harmful result of the misconduct of the trial judge can be obviated by bringing the matter to his attention, as a predicate to claiming error on appeal, an assignment of such misconduct must be made in the trial court."

The court then reviewed statements and conduct on the ground that the accidental death or loss is of here, and found "that in no instance was the remark of the trial judge of a nature the prejudicial effect of which could not have been removed if the matter had been called to his attention."

The cases cited by Appellant in support of its position are clearly distinguishable from the case at bar. In each case there was a showing of either, and sometimes both, sharp criticism of an Appellant's counsel and cause and statements to the jury which amounted to directed verdict on issues of fact which were in dispute between the parties.

(j) Miscellaneous Issues:

Appellant misstates the Appellee's burden of proof. Appellee was required to prove that he was totally and permanently disabled within the language of Appellant's policy and that such disability resulted directly and independently of all other causes from an accident, which necessarily means, and the trial court so instructed, that the disability could not result from illness, disease or bodily infirmity. If Appellant maintained that Appellee's injuries were the result of illness, disease or bodily infirmity, Appellant had the burden of so showing. Appellant, throughout the course of all these proceedings, has attempted to shift this burden of proof to the Appellee.

The Idaho Supreme Court held in *O'Neil v. New York Life Insurance Co.*, 65 Idaho 722, 152 Pacific

2d 707, that where the insurer seeks to avoid liability on the ground that the accident death or loss is within one of the exceptions of the policy the burden is on it, not the insured, to prove facts bringing the case within the exception.

And in 142 ALR annotation Page 746 appears the following statement on this issue:

> "Although there appears to be some authority to the contrary * * * the rule supported by the overwhelming weight of authority, in cases involving accident policies or other policies with accident features containing express conditions or exceptions excluding or limiting the coverage of the policy as to an injury or death which would otherwise be within such coverage, is that the burden of proving that the insured's injury or death was within such conditions or exceptions is on the insurer, and that the plaintiff is not under any burden of negativing application of such exceptions or conditions."
>
> See also *New York Life Insurance Co. v. Wilson* (9th Cir.) 178 F 2d 534.

A great deal of evidence was produced by Appellee to support the jury's finding that Appellee's disability resulted directly and independently of all other causes. The burden of proof was on Appellant to show that the injuries caused by the accident of September 9, 1963, was within the exclusions of the policy for illness, disease, bodily infirmity, etc.

Without attempting to set out the great volume of testimony in the record from which the jury found that Appellee did sustain his burden of proof, to-wit: that the bodily injuries resulted directly and independently of all other causes from the September 9, 1963, accident, we will briefly summarize it as follows:

The testimony of Appellee (TR 11-19, 22, 51), his wife Laura Thompson (TR 267-268), Robert Hobson (TR 229-232), James G. Roche (TR 251-252), John Ward (TR 256), and Dr. Jerome Burton (TR 104-105) all sustain the proposition that Appellee was a robust healthy man capable of performing heavy construction work before going overseas, and that upon his return he was in very poor physical condition (TR 106-108, 230-231, 253-254, 259-260). The medical testimony of Dr. Franklin C. David (TR 214-216), Dr. James J. Coughlin (TR 278-279), Dr. M. B. Shaw (TR 180, 205), and Dr. Jerome K. Burton (TR 125) all attribute his disability to the September 9, 1963, accident or to the combination of the accident and effects of the myleographic diagnostic procedure (TR 282-285), and that such injuries totally and permanently disabled him from performing his occupation (TR 125, 278-279). There is a great abundance of testimony in the record, portions of which have been heretofore referred to by transcript references, to sustain Appellee's contention and the jury's finding that Appellee's total disability as defined in the policy resulted directly and independently of all other causes from the accident of September 9, 1963.

Appellant next raises the question:

> "If Appellee's proof meets said burden, did Appellee meet the burden of proof that after the existence of one year of continuous total disability commencing within 365 days after the accident of September 9, 1963, he was totally and permanently disabled from engaging in an occupation or employment for which he might be fit by reason of education, training or experience?"

We refer to our references throughout this brief to testimony illustrating the extent of Appellee's disability.

Finally Appellant raised the following question:

> "Was the action of the Court in ruling on evidence during the trial, and in ruling on the motions for voluntary dismissal, directed verdict, judgment notwithstanding the verdict, and new trial prejudicial error?"

This we feel is inclusive of all Appellant's specific assignments of error individually covered and refuted in this brief.

Appellant maintains that the hospital chart (Exhibit 6) does not support Appellee's claims of leg pain following the myleogram. However, the hospital chart definitely shows that on at least two instances there was mention in the chart of Appellee's leg pain (TR 161-162, 195-196, 310). Of course the fact that Appellee was almost constantly under

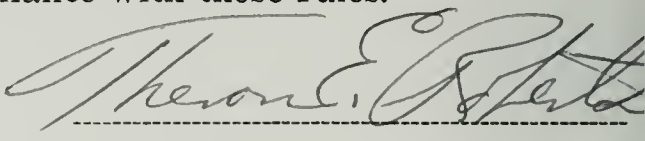
medication for pain while in the hospital needs to be considered since he would be less likely to have complained if his pain was suppressed by drugs. The hospital chart does show considerable pain medication being administered to Appellee during his hospital stay as well as definite references to leg pain following the myleogram (Exhibit 6), (TR 161-162).

3. *Conclusion*

Appellant has cited numerous alleged errors of the trial court, not only in his instructions, failure to give instructions and rulings on evidence, but also in his conduct and manner of handling the trial. However, nowhere in the record or in Appellant's Brief is there any explanation, reason or illustration of how or in what manner anything that occurred at the trial prejudiced Appellant. The issues in this case were primarily factual, both sides had full opportunity to present all relevant and material evidence, and we submit that the jury, from all evidence before it, rightly concluded that Appellee was fully capable of and was performing hard physical labor when he took out Appellant's policy and that after he suffered the accident of September 9, 1963, he was not qualified by reason of the accident, to do any work, and that he became and is totally and permanently disabled within the definitions of the policy.

CERTIFICATION

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



Attorney

ROBERTS & POOLE
Boise, Idaho